Tanalachimy a/p Thoraisamy & Ors v Jayapalasingam a/l Kandiah & Ors (sued as liquidators of the Great Alonioners Trading Corp Bhd) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-1635–07 OF 2013 AND W-02(IM)(NCVC)-1636–07 OF 2013
MOHAMAD ARIFF, DAVID WONG AND ABANG ISKANDAR JJCA
25 FEBRUARY 2014

Civil Procedure — Res judicata — Issue estoppel — Application to strike out action — Whether case scandalous or abuse of court process — Whether issues raised same as issues determined in earlier suit — Whether present plaintiffs 'privies' or having 'privity in interest' with plaintiffs in earlier suit — Whether overly rigid adherence to res judicata principle to be avoided

Civil Procedure — Res judicata — Privity of interest — Application to strike out action — Whether issues raised same as issues determined in earlier suit — Whether present plaintiffs 'privies' or having 'privity in interest' with plaintiffs in earlier suit — Definition of privity of interest — Plaintiffs made party to earlier suit without consent or authority — Absence of privity of interest — Whether res judicata applicable

Civil Procedure — Striking out — Application to strike out action — Res judicata — Whether case was prima facie obviously unsustainable — Whether scandalous or abuse of court process — Whether issues raised same as issues determined in earlier suit — Whether present plaintiffs 'privies' or having 'privity in interest' with plaintiffs in earlier suit — Whether overly rigid adherence to res judicata principle to be avoided — Rules of Court 2012 O 18 r 19

There were 140 appellants/plaintiffs and two defendants/respondents, namely the first respondent (liquidators of the company called The Great Alonioners Trading Corp Bhd ('Gatco')) and the second respondent (Thamarai Holdings Sdn Bhd ('Thamarai')). The subject matter of the dispute concerned several parcels of land which were held under leases originally granted to Gatco to be converted into a land development scheme for its members. The appellants participated in the scheme by settling on plots allotted to them in return for a payment. The appellants claimed that there was a constructive trustee relationship between Gatco and the appellants. The settlement scheme failed. Gatco was later wound up and the present liquidators were appointed. At this juncture, some 214 settlers made an offer to purchase the lands at RM16m but

the offer was rejected. The 214 settlers then filed a representative action by way of originating summons in the High Court ('the OS action') in the name of one Mariayee. The 214 settlers who sued through Mariayee included 59 of the present appellants. These appellants however denied authorising Mariayee to commence the OS action. They claimed that the power of attorney purported granted to Mariayee by them was forged. The respondent in the OS action was Gatco. The settlers in the OS action had submitted that they had acquired a proprietary interest in the land through the initial payment made at the start of the scheme. The High Court dismissed the OS action and the matter was appealed to the Court of Appeal, which dismissed the appeal. The Federal Court also dismissed the further appeal made to it. After the dismissal of the appeal in the OS action by the Federal Court, the land was sold to Thamarai. The present writ action challenged the validity of the sale of the land to Thamarai by the Gatco's liquidators. The respondents in the present writ action applied to strike out the writ and statement of claim under O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012. Both applications raised the issues of res judicata and issue estoppels. Thamarai raised an additional issue pertaining to indefeasibility of their title. The learned judicial commissioner ('JC') agreed with the respondents' contentions and struck out the writ and statement of claim on the grounds that the claim was barred by the doctrine of estoppel and res judicata. The JC held that the claim in the OS action was based on essentially the same issues. The appellants appealed against the JC's decision.

Held, allowing the appeal with costs in the cause:

(1) The rules of striking out under O 18 r 19(1) require the applicant to establish that the case of the opposing party is prima facie obviously unsustainable. The case must on its face be conspicuously unsustainable and the power has to be exercised sparingly. The procedure is ill-suited for cases where the finding of unsustainability can only be reached upon a protracted hearing resembling a preliminary hearing by affidavit evidence on the merits of the case (see paras 33–34).

(2) As regards res judicata and issue estoppel, where they clearly apply on the facts, a subsequent action filed can be struck out as being scandalous or an abuse of court process (see para 35).

(3) This appeal concerned more a question of issue estoppel rather than cause of action estoppel. The cause of action framed in the writ action was premised on breach of trust, invalidity of the sale and purchase agreement between Gatco and Thamarai and equitable fraud. The OS action, on the other hand, was premised more on whether the settlers acquired a priority of interest (see para 40).

(4) On the issue of whether the present plaintiffs were 'privies' or had a 'privity in interest' with the plaintiffs in the origination summons action,

the cases have not adopted a very wide concept for these terms. There has to be more than 'proof of curiosity or concern in the litigation' or just 'some interest in the outcome'. There has to be a sufficient degree of identification between the two parties. When some parties were disputing their inclusion as plaintiffs in the previous action and alleging forgery, it would be stretching the term 'privy' to regard them as 'privies'. Shortly put, no party can be compelled to accept a legal conclusion that he is a privy or share a privity in interest with another litigant by an alleged subterfuge — in this case, forgery. Whether this allegation is true or false will be a finding of fact on the evidence to be fully ventilated by a trial process. It cannot be disposed of by a summary process (see paras 45–46).

(5) Res judicata is essentially an equitable doctrine founded on considerations of public policy. There could be situations when an overly rigid adherence to the doctrine can lead to oppression to a party, in which event it may be inequitable to apply it unquestioningly (see para 46).

(6) It was not plain and clear that the same issues were canvassed before the earlier courts or formed the basis of the earlier decision. On the contrary, on a prima facie basis, they did not appear to be so. When the JC concluded that the issue of constructive trust and its breach was decided in the earlier action and therefore res judicata and issue estoppel applied, there was a clear misdirection on the facts and the law by the court which invited appellate intervention (see para 50).

[Bahasa Malaysia summary

Terdapat 140 perayu/plaintif dan dua defendan/responden, khasnya responden pertama (pelikuidasi-pelikuidasi syarikat yang dikenali sebagai The Great Alonioners Trading Corp Bhd ('Gatco')) dan responden kedua (Thamarai Holdings Sdn Bhd ('Thamarai'). Perkara pokok dalam pertikaian melibatkan beberapa bidang tanah yang dipegang di bawah pajakan yang pada asalnya diberikan kepada Gatco untuk ditukar kepada skim pembangunan tanah bagi ahli-ahlinya. Perayu-perayu telah mengambil bahagian dalam skim ini dengan mengambil plot-plot yang diperuntukkan sebagai balasan bagi bayaran. Perayu-perayu mendakwa bahawa terdapat hubungan pemegang konstruktif antara Gatco dan perayu-perayu. Skim penempatan tersebut gagal. Gatco kemudiannya digulung dan pelikuidasi-pelikuidasi dilantik. Pada masa ini, sebilangan 214 peneroka menawarkan untuk membeli tanah-tanah tersebut pada harga RM16 juta tetapi tawaran tersebut ditolak. 214 peneroka tersebut memfailkan tindakan perwakilan melalui saman pemula di Mahkamah Tinggi ('tindakan SP') di bawah nama Mariayee. 214 peneroka yang mengambil tindakan melalui Mariayee melibatkan 59 perayu-perayu kini. Perayu-perayu ini walau bagaimanapun menafikan memberikan kuasa kepada Mariayee untuk memulakan tindakan SP. Mereka mendakwa bahawa kuasa pelantikan yang didakwa diberikan kepada Mariayee oleh mereka telah

dipalsukan. Responden dalam tindakan SP adalah Gatco. Peneroka-peneroka dalam tindakan SP menghujahkan bahawa mereka mengambil alih kepentingan pemilik ke atas tanah tersebut melalui bayaran asal yang dibuat pada permulaan skim. Mahkamah Tinggi menolak tindakan SP dan perkara tersebut dirayu kepada Mahkamah Rayuan, yang menolak rayuan tersebut. Mahkamah Persekutuan juga menolak rayuan lanjut yang dibuat. Selepas menolak rayuan tersebut dalam tindakan SP oleh Mahkamah Persekutuan, tanah tersebut dijual kepada Thamarai. Tindakan writ ini mencabar kesahan jualan tanah kepada Thamarai oleh pelikuidasi-pelikuidasi Gatco. Responden-responden dalam tindakan writ ini memohon untuk membatalkan writ dan penyata tuntutan di bawah A 18 k 19(1)(b),(c) dan (d) Kaedah-Kaedah Mahkamah 2012. Kedua-dua permohonan membangkitkan isu-isu res judicata dan estopel. Thamarai membangkitkan isu tambahan berkenaan ketakbolehan disangkal hak milik. Pesuruhjaya kehakiman bersetuju dengan hujahan-hujahan responden-responden dan membatalkan writ dan penyata tuntutan atas alasan bahawa tuntutan tersebut terhalang oleh doktrin estopel dan res judicata. PK memutuskan bahawa tuntutan dalam tindakan PK pada dasarnya berdasarkan estopel dan res judicata. Perayu-perayu merayu terhadap keputusan PK.

Diputuskan, membenarkan rayuan dengan kos dalam kausa:

(1) Peraturan membatalkan di bawah A 18 k 19(1) memerlukan pemohon membuktikan kes pihak menentang adalah secara prima facie tidak boleh dikekalkan. Kes ini pada dasarnya mestilah secara mudah dilihat sebagai tidak boleh dikekalkan dan kuasa tersebut mestilah dijalankan dengan berhati-hati. Prosedur ini tidak sesuai dengan kes-kes di mana dapatan tidak boleh kekal hanya boleh dicapai dengan perbicaraan yang berlarutan menyerupai perbicaraan awal melalui keterangan afidavit mengenai merit kes tersebut (lihat perenggan 33–34).

(2) Berkenaan res judicata dan isu estopel, yang mana terguna pakai kepada fakta, tindakan susulan yang difailkan boleh dibatalkan atas alasan bersifat skandal atau salahguna proses mahkamah (lihat perenggan 35).

(3) Rayuan ini berkaitan lebih kepada soalan isu estopel daripada kausa tindakan estopel. Kausa tindakan yang dinyatakan dalam tindakan writ dipremiskan atas pelanggaran amanah, ketaksahan perjanjian jual beli antara Gatco dan Thamarai dan penipuan berasaskan ekuiti. Tindakan SP, sebaliknya, dipremiskan lebih kepada sama ada peneroka-peneroka memperolehi kepentingan dalam kepentingan (lihat perenggan 40).

(4) Mengenai isu sama ada plaintif-plaintif kini adalah privi atau mempunyai priviti dalam kepentingan dengan plaintif-plaintif dalam tindakan saman pemula, kes-kes tidak mengguna pakai konsep yang luas bagi terma-terma ini. Mestilah terdapat lebih daripada 'bukti rasa ingin tahu atau kebimbangan dalam litigasi' atau sekadar 'sedikit kepentingan

dalam hasil'. Mestilah terdapat tahap pengecaman yang mencukupi antara pihak-pihak. Apabila pihak-pihak mempertikaikan kemasukan mereka sebagai plaintif-plaintif dalam tindakan sebelumnya dan dakwaan pemalsuan, ia akan meluaskan terma 'privi' untuk menjadikan kesemuanya 'privi-privi'. Secara ringkasnya, tiada pihak yang boleh dipaksa menerima kesimpulan undang-undang bahawa dia adalah privi atau berkongsi kepentingan priviti dengan seorang lagi litigan melalui dakwaan dalihan — dalam kes ini, penipuan. Sama ada dakwaan ini benar atau tidak adalah dapatan fakta ke atas keterangan yang akan dibicarakan sepenuhnya melalui proses perbicaraan. Ia tidak boleh dilupuskan melalui proses ringkas (lihat perenggan 45–46).

(5) Secara asasnya, res judicata adalah doktrin ekuiti berdasarkan pertimbangan-pertimbangan polisi awam. Terdapat situasi-situasi yang mana pematuhan ketat kepada doktrin akan menyebabkan penindasan kepada satu-satu pihak, dalam keadaan yang mana tanpa soal lagi, tidak berekuiti untuk diguna pakai (lihat perenggan 46).

(6) Adalah tidak jelas bahawa isu-isu yang sama yang dipersoalkan di hadapan mahkamah atau membentuk asas dalam keputusan terdahulu. Sebaliknya, atas dasar prima facie, kesemuanya tidak kelihatan sedemikian. Apabila PK memutuskan bahawa isu amanah konstruktif dan pelanggarannya diputuskan dalam tindakan terdahulu dan oleh itu res judicata dan isu estopel terpakai, jelas terdapat salah arah fakta dan undang-undang oleh mahkamah yang mengundang campur tangan rayuan (lihat perenggan 50).]

Notes

For cases on application to strike out action, see 3(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8384–8414.

For cases on issue estoppel, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7551–7574.

Cases referred to

Carl-Zeiss Stiftung v Rayner and Keeler Ltd and others (No 2) [1966] 2 All ER 536, HL (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90, HC (refd)

Gleeson v J Wippell & Co [1977] 1 WLR 510, Ch D (refd)

Hunter v Chief Constable of West Midlands and another [1981] 3 All ER 727, HL (refd)

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC (folld)

Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577, FC (folld)

Raichel v Magrath (1889) 14 App Cas 665, HL (refd)

Rasamalar Gnanasundram v Letha Madhavan & Ors [2012] 10 CLJ 746, HC (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)
Thoday v Thoday [1964] P 181, CA (refd)

Legislation referred to

National Land Code ss 320, 340(2)
Rules of Court 2012 O 18 r 19, (1)(b), (c), (d)

Appeal from: Civil Suit No 22 NCVC-1484–12 of 2012 (High Court, Kuala Lumpur)

R Sivarasa (R Kengadharan and C Sivasankar with him) (R Kengadharan & Co) for the appellants.
Chow Keng Chin (Indra Gandhi & Co) for the first respondent.
B Thangaraj (Mohd Munir bin Abdullah with him) (Munir & Co) for the second respondent.

Mohamad Ariff JCA (delivering judgment of the court):

INTRODUCTION

[1] In these interlocutory appeals from the decision of the High Court which struck out the plaintiffs' writ and statement of claim under O 18 r 19 of the Rules of Court 2012, there are altogether 140 appellants ('the plaintiffs') with two sets of respondents, namely the first respondents comprising the liquidators of the company called The Great Alonioners Trading Corp Bhd ('Gatco') and the second respondent which is a company named Thamarai Holdings Sdn Bhd ('Thamarai'). One appeal is brought against the striking out application filed by the first respondents (encl 7), while the second appeal concerns the striking out application filed by the second respondent (encl 10). Both were allowed by the High Court. After hearing full submissions by counsel and appreciating the special circumstances of this case, and the issues of law which have been extensively submitted bearing on the exact perimeters of the doctrines of res judicata and issue estoppel (and their relationship), as well as the ramifications of the legal concepts of 'privies' or 'privies in interest', on the premise that res judicata binds not only the immediate litigants but also their 'privies', we reserved our decision to a later date. We now provide our full decision.

THE PARTIES

[2] It bears emphasis that the appellants here number 140 persons. The 140

appellants were the plaintiffs in the writ action. They sue in their individual capacities. The first respondents are the liquidators of Gatco. The second respondent ('Thamarai') is the purchaser who purchased the parcels of leased land, the underlying subject matter of the action, from the liquidators.

[3] We now turn to a narration of the underlying material facts to analyse the subject matter of the dispute, the position of the respective parties in relation thereto and the decisions of the several courts bearing on the issue of res judicata, issue estoppel, privies and privies in interest, against a consideration of whether this appeal is a proper case for summary disposal under a striking out proceeding.

BACKGROUND FACTS

[4] The subject matter of the dispute concerns several parcels of land (Lots 774, 775 and 776, HS(D) Leases 21, 22, 23) which are held under leases originally granted in 1977 by the State Economic Development Corp of Negeri Sembilan ('SEDC') to Gatco to be converted into a land development scheme by the National Union of Plantation Workers ('NUPW') for its members, originally to be planted with sugar cane but later converted to the planting of rubber. Gatco itself was incorporated by NUPW for this purpose. The leases for 66 years registered in Gatco's name on 27 November 1977 totalled approximately 4,700 acres ('the land'). As pleaded in the statement of claim, NUPW had invited its members to participate in the scheme. The present plaintiffs/appellants took up the offer and each paid a sum of RM7,600 as deposit. They settled on the plots allotted to them and worked upon the land. It is pleaded that they 'have been in undisturbed possession of the land since 1977.'

The indorsement on the lease

[5] The leases were registered in Gatco's name, with an indorsement reading:

> The lessee shall be entitled to charge the said land but the interest of the participants shall not be prejudiced and all liabilities arising from the said charge shall be borne by the lessee.

[6] This indorsement, it is argued by the appellants, results in a constructive trustee relationship between Gatco and the settlers.

Failure of the land settlement scheme and the charging of the land

[7] The settlement scheme failed. Gatco had obtained additional financing from two financial institutions (United Asian Bank ('UAB') and Nederlandse

Financiering Maatschappi Voor Ontwik Kelingslanden ('FMO')), and these parcels were then charged to these two financial institutions as secured creditors. It appears from the evidence that these lands were charged only sometime in 1978 and 1984, meaning to say, after the plaintiffs had paid their deposit mentioned earlier above. See the background facts as analysed by the Court of Appeal in an earlier decision dated 17 February 2010 (Civil Appeal No N-02–566 of 2008).

[8] It is the respondents' position that this earlier decision of the Court of Appeal (and that of the Federal Court on appeal) bind the present appeal as a matter of res judicata. The appellants maintain otherwise. This earlier decision will be analysed in detail shortly in this judgment. We now quote an excerpt of relevance to elucidate the background facts:

> The purpose of the said lease to GATCO was for GATCO to develop the lands for the cultivation of sugar cane in accordance with a small-holders scheme upon the terms thereof where GATCO was entitled to sublease the lands to participants of the said scheme … of not more than 15 acres of the lands per settler for the above purpose (planting of sugar cane). To finance the planting of sugar cane, GATCO took out loans from both the Asian Bank ('UAB') and Nederlandse Financiering Maatschappi Voor Ontwik Kelingslanden ('FMO').
>
> As security the lease was charged to the banks as secured creditors pursuant to charges dated 4th August 1978 and 20 August 1984 …
>
> It was understood that there were approximately 468 settlers who had joined the scheme … At the same time the Respondent Company had also subdivided the said land to 615 subdivided titles, each measuring 1 acre. These 1 acre plots were to be offered and purchased by the settlement for purposes of their settlement …

[9] This narration of the material facts by the earlier Court of Appeal decision, however, fails to advert to another fact which is now averred to by the plaintiffs in the statement of claim, para 149, reading:

> 149 On 12 December 1987 this Honourable Court granted in favour of 46 settlers on the said land (none of whom were the plaintiffs) a declaration that they were the original settlers and purchasers of the said land and that each settler is entitled to eight (8) acres of land for rubber cultivation and one (1) acre of land for construction of a dwelling house and farming.

[10] This additional fact is not mentioned expressly in the narration of facts by the Court of Appeal in the earlier decision.

[11] The present appellants have put the issue in general terms. Some of the underlying facts, according to the appellants, are contentious and will require full ventilation in a full trial by writ. This case is therefore unsuited to be summarily disposed by a striking out application under O 18 r 19.

[12] On the undisputed facts, there was a default on the loans by Gatco whereupon the secured creditors appointed receiver and manager over the charged assets on 28 August 1992.

[13] Four years later, a third party ('M Karupanan Trading') presented a winding-up petition against Gatco for an indebtedness of RM135,000. Gatco was wound up on 21 November 1996 and the present liquidators were appointed on 21 July 1996.

[14] It appears that even after the appointment of the receiver and manager over the charged assets no attempt was made to institute any auction proceedings in relation to the charged lands. There was a tender exercise attempted but it failed. Thereafter, on 26 May 2004, nearly eight years after the liquidators were appointed, the liquidators invited interested parties to make a bid for the land. At this juncture, some 214 settlers made an offer to purchase the lands at RM16m. This offer was rejected, apparently because the settlers could not show proof of means to pay the balance purchase price. The 2% of the purchase price (RM320,000) of RM16m was however paid by them. The liquidators had also stated than that they were not obliged to accept any bid and reserved the right to vary the terms and conditions.

The originating summons action in the High Court, Seremban

[15] It was at this juncture that the 214 settlers filed an action by way of originating summons in the High Court at Seremban (Originating Summons No 24–1360 of 2004). This was commenced by a representative action in the name of their representative, Mariayee a/p Palaniappan, 'bertindak sebagai wakil kepada peneroka-peneroka Kampung GATCO'. The 214 settlers were sued through Mariayee included some names (59 in all) who comprised some of the present appellants in this immediate appeal. These appellants have denied authorising Mariayee to commence the earlier action in their names. They have expressly denied granting the power of attorney to Mariayee to act on their behalf.

[16] The respondent in this originating summons action was the Great Alonioners Trading Corp Bhd, the present respondent ('Gatco') in this appeal.

[17] The settlers who instituted the originating summons action submitted that as a matter of contract they had acquired a legal interest in the land through the initial payment of the deposit at the start of the scheme and had each contributed RM5,593.52 for the further deposit sum for the land, and therefore, relying principally on the cases of *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 and *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577, claimed that they had acquired a proprietary interest in the land.

See the reference to this submission in the written judgment of the Court of Appeal which heard the appeal from the High Court, Seremban (at p 6 of the judgment, included in Tab H of the first respondent's bundle of authorities).

Consent judgment of 8 November 2004

[18] It appeared that a consent judgment was entered between the 214 settlers and Gatco on 8 November 2004 whereby the parties agreed not to sell or deal with the land until the matter was disposed of by the High Court, Seremban. Nevertheless, the record disclosed that Gatco entered into a sale and purchase agreement with Thamarai on 2 December 2006 to sell the land.

[19] The liquidators of Gatco had argued that it was not obliged to sell the land to the settlers for failure to show proof of their financial competency to complete the sale. The settlers had submitted a proposal to pay the balance of the purchase price through the proceeds from the felling of the rubber trees on the land, which was not found acceptable to the liquidators.

The broad grounds of the Court of Appeal in the originating summons appeal

[20] The High Court, Seremban dismissed the originating summons, and the matter was appealed to the Court of Appeal, which also dismissed the appeal by the settlers. Given the importance of the arguments on res judicata and issue estoppel in this present appeal before us, we reproduce below in full that part of the appeal in the previous Court of Appeal judgment bearing on these issues. We quote pp 15–16 of the judgment below:

> After hearing both parties are reading the document before us, we come to a unanimous decision to reject the appellant's plea. Our broad grounds are as follows:
>
> (a) The reliefs prayed for in the originating summons would, if granted, affect the rights and interests of the chargors who were not made parties to this proceeding. We must not lose sight of the respondent's obligations toward the chargors.
>
> (b) The failure of the appellant to provide full and concise particulars of the intended purchasers, and failure to provide any other information of other settlers not made plaintiffs to this proceeding would inevitably affect the rights and interests of the other settlers (who are non-plaintiffs).
>
> (c) We are of the view too that the liquidators had the own duties and responsibilities. Their rights cannot be impeded by the offer to purchase for the appellant, who were uncertain about the payment of the balance of the purchase price.
>
> (d) We are of the view that the appellant is estopped from claiming that they have priority to purchase the said land on the simple premise that they had participated in the tender exercise.

(e) The appellants in their affidavit affirmed on 14 June 2006, had admitted the priority interest of the chargees in Clause 2 (h) … They had agreed that it is the duty of the liquidators to wind up the affairs of the respondent company and settle the debts due to the chargees.

[21] The Court of Appeal also concluded that 'based on the nature and character of the prayers in the originating summons' any order granted in the settlers' favour 'will render the said orders to be made in vain.' At this juncture, it is noteworthy to stress that one of the 'broad grounds' stated included the ground that insufficient particulars of the other affected settlers being given in the proceedings would 'inevitably' affect their rights and interests too.

Dismissal of the further appeal by the Federal Court

[22] The Federal Court granted leave to appeal to the settlers but the Federal Court subsequently dismissed the substantive appeal. No written ground for the dismissal was supplied by the Federal Court.

THE CLAIMS IN THE PRESENT WRIT ACTION

[23] Unlike the originating summons action, which was between the 214 settlers suing through their attorney ('Mariayee') against the liquidators of Gatco, the present writ action, as said earlier in this judgment, is instituted by the 140 appellants in their personal capacity against not only the liquidators of Gatco but also against the purchaser of the land, Thamarai. The sale and purchase had been perfected after the dismissal of the appeal in the earlier action by the Federal Court. Thamarai is presently registered as the landowner.

[24] As can be appreciated from the previous analysis of the originating summons action, the emphasis there was on whether the applicants had a priority of interest in the land since they had a proprietary interest over the land. In the present writ action, however, the challenge mounted is over the validity of the sale of the land to Thamarai by the liquidators. See paras 156–160 of the statement of claim. Paragraph 156, for instance, avers:

156(a) By an agreement in writing dated 2 December 2004 ('the sale agreement') the first named defendants purported to sell the said land to the second defendant for a sum of RM16m. The said sale was null and void because:

(i) It was entered into in violation of the consent order pleaded under paragraph 13 hereof; and

(ii) It was entered into in breach of the trust pleaded …

[25] The 'trust' referred to is the alleged 'constructive trust' said to arise from

the indorsement on the lease which has been adverted to earlier in this judgment.

The reliefs in the writ action

[26] The present appellants claim the following reliefs:

(a) a declaration that the first named defendants and second defendant are trustee of the said land and they hold the same for the plaintiffs;

(b) an order setting aside the sale of the said lands from the first named defendants to the second defendant;

(c) monetary compensation for breach of trust;

(d) a perpetual injunction restraining the first named defendants and the second defendant from dealing with the said lands in any manner whatsoever; and

(e) an order directing the registrar of titles to enter his caveat under s 320 of the National Land Code upon the register of title of the said lands …

[27] The defendants in this writ action filed two separate applications (encls 7 and 10), under O 18 r 19(1)(b), (c) and (d), to strike out the writ and statement of claim. Both applications raised the issues of res judicata and issue estoppel, but the second defendant ('Thamarai') raised an additional issue pertaining to s 340(2) of the National Land Code, ie that Thamarai now possesses an indefeasible title to the land. It is argued the plaintiffs/appellants have not pleaded that the title is defeasible.

THE DECISION OF THE HIGH COURT IN THIS WRIT ACTION

[28] The learned judicial commissioner in the High Court below agreed with the defendants' contentions and thus struck out the writ and statement of claim. The claim was struck out as it was 'barred by the doctrine of estoppel and res judicata.' (see p 34 of the judgment of the judicial commissioner). In his finding, the judicial commissioner held that the claim in 2004 was based on essentially the same issues. It was then also submitted that the sale and purchase agreement with Thamarai was null and void, and that there was a constructive trust binding Gatco and Thamarai. See the following material excerpts from the judgment which appears at pp 11–20 (the paragraph numbers are retained):

> [16] In the 2004 suit the claim for relief was based on the argument that the settlers had prior interest on the land and that there was a conservative (sic? constructive?) trust in favour of the settlers. The plaintiffs in the 2004 suit had also argued that the

A sale agreement was null and void as it was in breach of the consent order entered into between the plaintiffs and the first defendants in the 2004 suit …

[18] Therefore, it is very clear that the very issues raised by the plaintiffs in this suit were raised by the plaintiff in the 2004 suit. All these issues were considered by the High Court when it dismissed the 2004 suit. The same issues were also canvassed B before the Court of Appeal …

[19] After hearing arguments of counsel, the Court of Appeal dismissed the appeal. The plaintiff in the 2004 suit then obtained leave to appeal to the Federal Court and in the notice of appeal Mariayee had laid down 10 grounds of appeal for the determination of the Federal Court, namely: C

1. The learned judges of the Appeal Court had erred in law in failing to consider that the liquidator of the company is bound by the covenant imposed on the company's asset (ie the lease land) when the liquidators sells the company's asset.

D 2. The learned judges of the Appeal Court had erred in law in failing to consider that since the deposit is profitable and is meant to cover non-performance ie non-payment of the balance purchase price, it was not just, fair, reasonable, bona fide and equitable on the part of the respondent acting through the liquidator to demand and require a term on the source and certainty of payment of the balance purchase price in commercial E transactions generally and in light of the covenant referred to in (1) above.

3. The learned judges of the Appeal Court had erred in law to consider that the liquidator had stepped into the shoes of GATCO and by reason of the covenant aforesaid had in fact assumed the position of a constructive trustee.

F 4. The learned judges of the Appeal Court had erred in law in failing to consider that the liquidator had accepted the settler's offer to purchase the said land at the price of RM16m, and had subsequently accepted the earnest deposit of RM320,000 paid by the settlers. Hence the liquidator is estopped from selling the said land to Thamarai Holdings Sdn Bhd on second G December, 2004, brushing aside the rights of the settlers on the said land and in breach of the consent order dated 29 November 2004 and relying on the fraudulent letter dated 20 August 2004 purportedly issued by RHB Bank Berhad, Subang Jaya …

5. The learned judges of the Appeal Court had erred in law in holding that the prayers in Originating Summons No: 24–1350 of 2004 Seremban High H Court would affect the rights and interests of the secured creditors who were not parties to this proceedings and for all purposes the proceeds of the sale (amounting to RM16m) would be paid to the liquidators for the benefit of, inter alia, the secured creditors …

I 6. The learned judges of the Appeal Court had erred in law in not considering that the settlers were invited on the land to participate in the scheme by paying a deposit sum of RM 7,600 … each in the year 1977, and that there was not prove (sis) to show that the settlers had given the consent to GATCO to charge the said land to United Asian Bank Berhad and Nederlandse Financierings-Maatschappij Voor Ontwik Kelingslanden …

7. The learned judges of the Appeal Court had erred in law in not considering that the rights of the settlers who had resided and worked on the land since the year 1977 is first in priority to the rights of all other purchasers and that the sole purpose of the purchase of the said land by the settlers was to protect their rights and to carry on with their livelihood.

8. The learned judges of the Appeal Court had erred in law in that they have failed to consider that Thamarai Holdings Sdn Bhd had only paid an earnest deposit amounting to RM 280,000 … whereas appellant had paid RM320,000 … and this goes to show that Thamarai Holdings Sdn Bhd had only offered an initial purchase price of RM14m….

9. The learned judges of the Appeal Court had erred in law in holding that the liquidator had not represented to the appellant that the balance of the purchase price could be paid by felling and selling the rubber wood although there were contemporaneous correspondence between liquidator and the appellant and from the onset the appellant had averred in her affidavits that the liquidator was the one who had advised and represented to her that the balance of the purchase price could be paid from the sale of the rubber wood.

[20] The Federal Court after having heard arguments dismissed that appeal. Now, what is of importance in that Federal Court appeal is that the issues relating to:

i. the settlers' alleged priority of interest in the land;

ii. the constructive trust where GATCO is said to hold the land as constructive trustee for the benefit of the settlers; and

iii. the sale agreement being entered into during the pendency of the interim consent order;

iv. the issue of covenant in the lease in respect of the charging of the land and not prejudicing the interest of the settlers; and

v. the issue of priority in interest of the chargees over the settlers and whether their consent is required for the charge to be created on the land;

which are also the issues raised in this suit were all canvassed before the Federal Court. Mariayee did not succeed in any one of the 10 grounds. Therefore, with the dismissal of that appeal by the Federal Court, these issues have been determined with finality.

THE APPELLANTS' SUBMISSIONS

[29] The appellants impressed upon us that the scheme was one involving workers who belonged to the NUPW, and when the land was leased to the Union by SEDC, it was an express condition, as seen in the indorsement, that although Gatco could charge the land, the interests of the participants in the scheme should not be prejudiced. There was therefore a constructive trust in the settlers' favour. The liquidators of Gatco had purported to sell the land to Thamarai although there was an interim order not to sell, and Thamarai had notice of the constructive trust. Counsel for the appellants stressed that they are

relying on equitable fraud. On the res judicata and issue estoppel point, counsel argues the issues between the 2004 suit and the present one are different, and in this light the learned judicial commissioner had misdirected himself when holding otherwise. The learned judicial commissioner should have looked only at the broad grounds of the Court of Appeal (the Federal Court not having provided written grounds) and it would be evident that the issue of constructive trust was not part of the broad grounds. In particular, what appears as para 21 in the judgment of the judicial commissioner is said to be a clear misdirection. To place the submission in context, para 21 is quoted below:

> [21] In this regard, I agree with submissions by counsel of the first and second defendants that the doctrine of issue estoppel will apply. A comparison of the pleadings in the 2004 suit and the present suit shows that the plaintiffs cause of action herein is grounded on the constructive trust said to exist between GATCO as trustee (and by extension to the first defendants as liquidators) and the settlers as beneficiaries. There is also the similar challenge to the validity of the Sale Agreement on the identical grounds of it having been executed in breach of the then existing interim Consent Order issued by the Seremban High Court. The fact that the parties in that suit and this suit are different does not bar the application of the principles of issue estoppel where the subject matter in the suit being litigated and the issues determined by another court of competent jurisdiction are the same.

[30] The appellants' reference to 'equitable fraud' as one basis of their claim is premised, inter alia, on the definition as stated in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291, in that it is 'not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud.' The sale of the land to Thamarai at an undervalue, and in disregard of the constructive trust, would be evidence of such equitable fraud, it is argued.

[31] It is also strenuously advanced in argument that the present appellants are different from the settlers in the 2004 suit. Of the 49 settlers who were supposed to be represented by Mariayee in the 2004 suit, they have stated categorically they did not authorise Mariayee to be their attorney and their signatures had been forged in the process.

[32] We have also been reminded on the governing principles on striking out under O 18 r 19. The case must be 'obviously unsustainable'. The court at this stage should not be concerned, and deciding on, the substantive merits of the case, but should address its mind on whether there are issues that should be further ventilated at trial. On the facts of this case and this appeal, there are, it is argued, major contentious issues of fact and law that cannot be decided summarily under a striking out procedure. Thus, we are urged to allow these two appeals and remit the case back for trial.

THE RELEVANT LAW ON RES JUDICATA AND ISSUE ESTOPPEL

[33] The rules of striking out under O 18 r 19(1) require the applicant to establish that the case of the opposing party is prima facie obviously unsustainable. The Malaysian 'White Book', namely 'Malaysian Civil Procedure 2013' has usefully summarised the governing rules thus:

> It is not designed as a mechanism for the defendant to force a preliminary hearing on the merits, but is rather aimed at culling actions in plain and obvious cases, ie where there is no reasonable cause of action, to avoid an unnecessary trial or if the claim is frivolous, vexatious or an abuse of court process, or if the defence is unarguable. The power of the courts under the four grounds of this rule is exercised when it can clearly be seen that a claim or answer is prima facie obviously unsustainable …The court's power under this rule applies to conspicuously unsustainable cases and is exercised sparingly by the courts … (see p 241 of the text).

[34] In short, the case must on its face be conspicuously unsustainable and the power has to be exercised sparingly. The procedure is ill-suited for cases where the finding of unsustainability can only be reached upon a protracted hearing resembling a preliminary hearing by affidavit evidence on the merits of the case. The rationale for this is not difficult to appreciate, for a litigant should not be shut out from the judgment seat so summarily unless he obviously has no defensible case.

[35] As regards res judicata and issue estoppel, where they clearly apply on the facts, a subsequent action filed can be struck out as being scandalous or an abuse of court process. Counsel for the first respondent cites, inter alia, the House of Lords decision in *Hunter v Chief Constable of West Midlands and another* [1981] 3 All ER 727 as authority. Lord Diplock in that case, citing Lord Halsbury in *Raichel v Magrath* (1889) 14 App Cas 665, held the view that 'it would be a scandal to the administration of justice' to allow a matter to be re-litigated. Acknowledging that a court should be slow to strike out a statement of claim, yet when 'identical questions' are sought to be raised, it ought to do so.

[36] The determinative issue to be decided in this appeal is whether either res judicata or issue estoppel, or both, apply on the facts and circumstances of this case.

[37] The present appellants, the plaintiffs in the High Court, were not all parties in the 2004 originating summons action, except possibly for 49 of them who now claim their signatures were forged on the power of attorney granting Mariayee the authority to institute the action on their behalf. However, as a matter of general principle of law, for res judicata or issue estoppel to apply, the

parties in the subsequent action need not be identical. See eg *Rasamalar Gnanasundram v Letha Madhavan & Ors* [2012] 10 CLJ 746:

> … it is very clear from these high authorities that the doctrine of issue estoppel is not limited to its application to the same parties in two different actions but extends to actions involving their privies or to those who have privity in interest.

[38] Typically, res judicata or *estoppel per rem judicatem* is identified with 'cause of action estoppel', and operates in a situation where there is an identity of parties, although this principle cannot be stated without qualification, for the principle extends to persons who are 'privies' or have a 'privity in interest' as well. *Spenser Bower, Turner & Handley, Res Judicata* (3rd Ed) explains the principle thus:

> The term 'cause of action estoppel … prevents a party from asserting or denying as against the other party, the existence of a particular cause of action, the existence or non-existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist ie judgment was given upon it, it is said to be merged in the judgment. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatem (at p 88, para 181 of the text).

[39] Cause of action estoppel therefore prevents the 'reassertion of the cause of action' whilst issue estoppel prevents the 'contradiction of a previous determination.' As a matter of nomenclature, cause of action estoppel and issue estoppel may be said to be two separate components of estoppel *per rem judicatem*.

[40] This appeal concerns more a question of issue estoppel rather than cause of action estoppel. The cause of action framed in the writ action, as seen earlier, is premised on breach of trust, invalidity of the sale and purchase agreement between Gatco and Thamarai and, as submitted, equitable fraud. The originating summons, on the other hand, was premised more on whether the settlers acquired a priority of interest. Nevertheless, the argument advanced by the parties being centred on issue estoppel, it becomes necessary to determine whether the same issues in both have been raised in the earlier action, and further, whether there have been final determinations in respect of these very issues. *Spenser Bower, Turner & Handley, Res Judicata*, addresses the problem in this way:

> When the decision relied upon did not determine the cause of action sued in the later proceedings, it may be invoked as determining, as an essential step in its reasoning, some issue in the second. Issue estoppel covers fundamental issues determined in an earlier proceeding, which formed the basis of the judgment. (p 183 of the text)

[41] Put in this way, the question becomes — are the issues now canvassed in the writ action also fundamental issues which formed an essential step in the reasoning which led to the decision in the originating summons action, or were they the basis of the earlier judgment?

[42] *Spenser Bower, Turner & Handley, Res Judicata,* also cited the opinion proffered by Diplock LJ in *Thoday v Thoday* [1964] P 181, as follows:

> … 'issue estoppel' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his causes of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of the separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

[43] On the issue of whether the present plaintiffs are 'privies' or have a 'privity in interest' with the plaintiffs in the origination summons action, the cases have not adopted a very wide concept for these terms. Counsel for the first respondent has referred us to the meaning of 'privies' as expounded in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90, which in turn adopts the analysis of Lord Reid in *Carl-Zeiss Stiftung v Rayner and Keeler Ltd and others (No 2)* [1966] 2 All ER 536. To enumerate a few categories mentioned in *Carl-Zeiss Stiftung*'s case they include the following:

(a) any person who succeeds to the rights or liabilities of a party after his death;

(b) personal representatives;

(c) assignees;

(d) liquidators; and

(e) successors in title to land.

[44] From the above enumeration, it can be seen that there has to be more than 'proof of curiosity or concern in the litigation' or just 'some interest in the

outcome' (*Gleeson v J Wippell & Co* [1977] 1 WLR 510. There has to be 'a sufficient degree of identification between the two parties (per Megarry VC in *Gleeson*).

[45] The question to be asked in the context of this appeal is whether there exists that 'sufficient degree of identification' between the plaintiffs in the originating summons action and the present plaintiffs in the writ action to make it just and reasonable that the present plaintiffs should be held bound by the outcome of the originating summons action?

EVALUATION AND APPLICATION OF THE LAW

[46] We have to stress that for the purposes of this appeal, we make no determination on the substantive merits of the claim by the plaintiffs/appellants, nor of the defences of the defendants/respondents. Our primary concern is whether this claim is on its face an obviously unsustainable one, as the term is understood in law. The respondents argue that it is, since the matter is res judicata or barred by issue estoppel. It is said that the present appellants are 'privies' or have a 'privity in interest' with the originating summons plaintiffs, particularly when, it is alleged, 49 of the previous plaintiffs are also the plaintiffs in this present claim before us on appeal. The subject matter for both actions is the very same land and the very same land settlement scheme, the same indorsement on the title, and the same allegation that the land is subject to a constructive trust where Gatco is the constructive trustee and the settlers the beneficiaries. All the issues have, it is alleged, been decided by the High Court, the Court of Appeal and the Federal Court in the earlier action. It is an accepted ground that the common party in both actions are the liquidators of Gatco. There is a hotly contested dispute whether the 49 plaintiffs in this action had authorised Mariayee to act as their attorney in the origination summons action. They claim their signatures have been forged. In any case, they are just 49 out of the 140 litigants in this appeal as appellants. By comparison, the total number of plaintiffs in the originating summons action was 214. Can the 140 plaintiffs/appellants now be regarded in law as 'privies' or persons having a 'privity in interest' with the previous plaintiffs? For a start, when some parties are now disputing their inclusion as plaintiffs in the previous action and alleging forgery, it will be stretching the term 'privy' to regard them as 'privies'. Shortly put, no party can be compelled to accept a legal conclusion that he is a privy or share a privity in interest with another litigant by an alleged subterfuge — in this case, forgery. Whether this allegation is true or false will be a finding of fact on the evidence to be fully ventilated by a trial process. It cannot be disposed of by a summary process. We cannot agree with the finding of the learned judicial commissioner that this fact is not material in relation to the ultimate outcome of the decision in the earlier action. Res judicata is essentially an equitable doctrine founded on considerations of

public policy. 'In modern terms, it is against public policy, and oppressive to the individual, to re-agitate disputes which have been litigated to a conclusion.' (*Spenser Bower, Turner & Handley, Res Judicata*, p 4) There could be situations when an overly rigid adherence to the doctrine can lead to oppression to a party, in which event it may be inequitable to apply it unquestioningly. We have been referred to the decision of the Court of Appeal in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, and the following passage in the judgment:

> Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. (at p 357 of the report, per Gopal Sri Ram JCA (as he then was))

[47] This reminder is particularly relevant on the facts of this appeal. We have elaborated at some length on the legal requirements to support a finding of 'privy' or 'privity in interest', and have emphasised the point that it is not satisfied just by arguing a later party has 'some interest in the outcome' of an earlier action. There has to be a real 'identification of interest', as the term is understood in law. Although the parties in both have a broad identity of interest in terms of the land and the land settlement scheme, we remind ourselves that this appeal is not dealing with that interest in the abstract but as a finding of the courts in the originating summons action. Quite apart from the issue of forgery, this question is tied up closely with the question of what were the legal issues which could be deduced as finally determined by the High Court, the Court of Appeal and the Federal Court in the originating summons action. This broaches the area of issue estoppel.

[48] To apply issue estoppel, it will become necessary to define clearly what are the issues which were finally decided by the earlier court so as to be held binding on a later court. There cannot be an issue estoppel if the issue or issues have not received a final determination. On a broader basis, the doctrine can apply if the issues or issues were fundamental issues which formed an essential step in the reasoning which led to the decision in the earlier action, or were the basis of the earlier judgment. We have adverted to the authorities on this point earlier in our judgment. We have also analysed the basis of reasoning of the earlier Court of Appeal in the originating summons action, and the issues which were the issues to be argued before the Federal Court. In the absence of the written grounds of the Federal Court, we can only assume that the Federal Court must have agreed with the basis of argument and the findings of the Court of Appeal on the several issues before the Court of Appeal. To recapitulate, these were the grounds of the earlier Court of Appeal decision:

(a) the reliefs prayed for in the originating summons would, if granted, affect

A the rights and interests of the chargors who were not made parties to this proceeding. We must not lose sight of the respondent's obligations toward the chargors;

(b) the failure of the appellant to provide full and concise particulars of the intended purchasers, and failure to provide any other information of other settlers not made plaintiffs to this proceeding would inevitably affect the rights and interests of the other settlers (who are non-plaintiffs);

(c) we are of the view too that the liquidators had their own duties and responsibilities. Their rights cannot be impeded by the offer to purchase for the appellant, who were uncertain about the payment of the balance of the purchase price;

(d) we are of the view that the appellant is estopped from claiming that they have priority to purchase the said land on the simple premise that they had participated in the tender exercise; and

(e) the appellant in their affidavit affirmed on 14 June 2006, had admitted the priority interest of the chargees in cl 2(h) … They had agreed that it is the duty of the liquidators to wind up the affairs of the respondent company and settle the debts due to the charges.

[49] It does not appear conspicuously clear that the issue of breach of the constructive trust formed a fundamental part or basis of the earlier reasoning. Priority of interest of the settlers was. It was, however, a fundamental part of the reasoning that the rights and interests of the other settlers who were non-parties would be affected by the decision and the plaintiffs had failed to provide full and concise particulars of the intended purchasers, and failed to provide any other information of other settlers not made plaintiffs.

[50] It is necessary to define with precision the exact issues which were determined by the earlier courts. We have done precisely that. At the present stage of the proceedings, which is limited to a consideration whether the case is obviously unsustainable, we are unable to conclude that it is plain and clear that the same issues were canvassed before the earlier courts or formed the basis of the earlier decision. On the contrary, on a prima facie basis, they do not appear to be so. In our view, when the learned judicial commissioner concluded that the issue of constructive trust and its breach was decided in the earlier action and therefore res judicata and issue estoppel applied, there was a clear misdirection on the facts and the law by the court which invites appellate intervention on our part.

[51] We have to again stress that we are dealing with an interlocutory appeal, and therefore make no final findings of facts and the several issues of law pertaining to the present claim by the 140 plaintiffs, or the defences of the

respondents. We are merely concluding in this appeal that in the totality of the circumstances, the facts and the applicable law, we do not find the claim of the present plaintiffs/appellants to be prima facie obviously unsustainable that it has to be summarily struck out under O 18 r 19(1). The defendants/respondents can still introduce evidence and submit on the issues of res judicata and issue estoppel during the trial, whilst giving the plaintiffs/appellants the full benefit of having their opportunity to fully ventilate their claim, including the allegation of equitable fraud involving the first and second respondents, and not be just summarily dismissed on contested affidavit evidence.

CONCLUSION AND ORDERS

[52] For the reasons and on the basis of our analysis of the facts and the applicable law as considered above, we are allowing this appeal with costs in the cause.

[53] The orders of the High Court dated 19 June 2013 striking out the plaintiffs' writ and statement of claim (in relation to encls 7 and 10), inclusive of the orders on costs in the High Court, are therefore set aside. The claim of the plaintiffs is reinstated. We further order that the case be remitted back to the High Court to be tried before a different High Court judge.

Appeal allowed with costs in the cause.

Reported by Kanesh Sundrum